91-1341

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

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THANH VONG HOAI, JOHN D. HEMENWAY, DAVID HEMENWAY

Petitioners,

THANH VAN VO, MILLARD F. OTTMAN, DAVID C. ROSEMAN, JONES, DAY, REAVIS & POGUE, J. GORDON FORESTER, JR., GEOFFREY WAGNER, JOSEPH ZULLI, SUN REFINING & MARKETING COMPANY, INC.

Respondents.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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## QUESTIONS PRESENTED

1) May a court of appeals depart from, from the tenets established by this Court in Conley v. Gibson (1957) 355 US 41, Foman v Davis (1962) 371 US 178 and Gomez v Toledo (1980) 446 US 635, returning us to the days when a single mistep in pleadings was fatal while pretending otherwise?

2) May it construe the language of a complaint, selectively, against the pleader on a motion to dismiss, refused to allow amendment prior to the filing of any responsive pleading knowing full well that such amendment would correct the purported deficiencies in the complaint and ignored those parts of the complaint that are clearly sufficient ?

3) While noting that it is well aware, as was the district court, of the court rule which was the focus of the 42 USC 1983 and 1985 complaint, may it, nonetheless, refuse to allow consideration of

this District of Columbia rule, even while acknowledging its awareness of it as the basis of the generalized allegations of the complaint, knowing that the consideration of it in the case would clearly make the complaint viable, even were its criticisms of the complaint valid?

4) May the general allegations of the pleading referring to the court rule in question be simply ignored by selective reading of the complaint so as to favor the defendants ?

5) In the process also, in the guise of solving a "jurisdictional" question which had long been answered, may the court of appeals consciously place the plaintiff's ensuing Rule 60 (b) motion and proposed first amendment of right filed in conjunction therewith (nothing but dismissal motions ever having been filed and there having been unacted upon motions to stay outstanding during the entire time) in a

limbo where it remains unacted upon by the district court in a manner that makes it clear that it will not be acted upon, thus deciding the Rule 60 (b) motion by "killing" it while pretending not to?

6) May the court of appeals depart far from this Court's decision in Lugar v Edmondson Oil Co., Inc. and sanction the use of unconstitutional pre-judgment procedures that not only enable the attachment of a man's business without due process but allow it to be seized in its entirety in flagrant violation of due process through the very procedures of a court?

7) May it refuse, upon petition for reconsideration, to apply to this case the decision of this Court, (intervening between oral argument and the opinion) in Edmonson v Leesville Concrete Co. which requires an analysis of the extent to which the state (in this case D.C.) government "delegated some portion of ...

power to private litigants" to allow deprivation of federal statutory and constitutional rights "to occur within the courthouse itself" "through explicit statutory authorization."?

8) May the court of appeals twist the famous ruling of Conley that no dismissal should be allowed unless no set of facts can be shown to prove plaintiffs' claim to mean that dismissal will be allowed if but the underlying facts of the plaintiffs' claim and their merits can be avoided?

9) May it ignore the right of a complainant to file one amendment as a matter of course before a responsive pleading has been filed and twisted the famous ruling of Foman that prejudice to parties opposing amendment must be demonstrated before dismissing when absolutely nothing has happened in the case. (In this case nothing had happened because of two motions to stay filed by plaintiffs pending the out-

come of related litigation before the same judge, an outcome greatly affecting the 42 USC 1983 and 1985 questions which that judge simply never got around to ruling upon before dismissing the present case without any allowance for further briefing and affidavits in light of the outcome of that other case, decided in favor of the principal plaintiff)?

10) May, relying upon past decisions of his own, the appellate judge create a new rule that there is only a limited number of situations in which amendment of civil rights pleadings will be allowed ?

11) Is there a line beyond which stated bias to "manage" a man's litigation so as to kill it becomes violative of that litigant's rights?

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THANH VONG HOAI, et al.
v.
THANH VAN VO, et al.

Petition for a Writ of Certiorari

I. Hoai v Vo (CA DC 1991) 935 F2d 308; related case before same judges: Hoai v Sun Refining & Marketing Company, Inc. (CA DC 1989) 866 F2d 1515

II. The grounds on which the jurisdiction of this Court are invoked are:

1) The Court of Appeals for the District of Columbia Circuit has rendered an opinion which conflicts with the decisions of this Court, including Conley v Gibson (1957) 355 US 41, Gomez v Toledo (1980) 446 US 640, Foman v Davis (1962) 371 US 178, Lugar v Edmondson Oil Co. (1982) 457 US 922, Edmonson v Leesville Concrete Co.(1991) 500 US ____, 114 Led2d 660, Scheuer v Rhodes (1974) 416 US 232, Hospital Bldg. Co. v Trustees of Rex Hospital (1976) 425 US 738, and Fudge v Penthouse International, Ltd. (1988) 109 S.Ct. 65.

2) The Court of Appeals has departed from the accepted and usual course with which civil rights complaints, litigants and cases are treated under the above cases and with regard to the consideration of stay motions, conversion from Rule 12 (b)(6) to Rule 56 where required and with regard to the considering and treating the issues raised by the parties.

3) The Court of Appeals has decided this case in a manner, with regard to the above which appears to conflict with decisions by other United States Courts of Appeal.

4) There are issues not decided by this Court that should be.

III. The judgment sought to be reviewed was contained in a memorandum opinion decided June 11, 1991.

IV. Rehearing denied Nov. 19, 1991.

V. Constitutional provisions: Amendments 1, 5, 7. Statutes: 42 USC 1981, 1982, 1983, 1985(2) and (3). D.C. Bar Code of

Ethics as adopted by the D.C. courts. D.C. Superior Court rule 12-I(b) as then in existence, Rule 65. See appendix.

VI. STATEMENT OF THE CASE

Jurisdiction in the district court was based on 42 USC 1983, 1985, 28 USC 1343.

This is the case of Hoai. The other two plaintiffs-petitioners are his attorney at the beginning of the incidents in question, John D. Hemenway, and the latter's son, David Hemenway, who was acting as Hoai's agent. Hoai is American but from Viet Nam. On April 10, 1986 he opened a Sunoco franchise in the District of Columbia at 2305 Pennsylvania Avenue, S.E. which he had been awarded.[1] About a month before opening the station Hoai had assisted his wife in reopening and getting going another business, a food mart, which

[1]Background facts are taken from the compant in this case and in Hoai's RICO case in the Eastern District of Virginia, which was in this case as an attachment to the J/D motion to dismiss. A-371, A-479

had been dormant, in Arlington, which the Hoais believed they were purchasing for Mrs. Hoai to run while Mr. Hoai ran the station. Hoai applied for the franchise, which had been vacant, in February, 1986 and was awarded it in March over other applicants. While he was waiting, two other Vietnamese, Minh and Luu, persuaded Hoai and his wife to take over the Asian food shop because Minh and Luu claimed they were too busy with a real estate development they owned in Philadelphia to run the mart. The Hoais protested that they were too tied up, as was their capital, in the franchise to become involved in the food business. By promises of financing from one Thach, who, Minh and Luu claimed, owned and was president of a bank, Minh and Luu persuaded Hoai and his wife to buy the food business on a loan-leveraged basis. Minh and Luu assured the Hoais that, since the food business generated a

steady stream of cash, money used in it could be increased and fed into the gas station as needed. Also at this time, one Vo, who claimed to be a wealthy Vietnamese construction contractor, offered to assist Hoai with any "loan" he needed to start up the Sunoco franchise. Hoai as it turned out also knew and was intimate with Thach, the alleged banker. While waiting for the loan for the food business from Thach, the "banker", the Hoais were persuaded to enter the food business and begin to operate it in March of 1986 in order to help out Minh and Luu, who claimed not to have the time to run that business, what with their important new project in Philadelphia. Mrs. Hoai was to operate it and Mr. Hoai was only helping out until he could open the Sunoco station a few weeks later.

Vo claimed to be putting up a loan for half the capital needed to start up the station over its first months, $35,000.,

by placing it in an account in "Thach's" bank which he opened in his, Vo's name, only, explaining that he needed to control the account and the proceeds of the station to secure his "loan."

It soon became apparent that all was not as represented to the Hoais by Thach, Vo, Minh and Luu. Despite early success by the Hoais in getting both businesses up and running, problems soon developed and both were taken by Minh, Luu, Thach and Vo, by a combination of trickery and threats of violence, including murder.

Sunoco knew of these things because its area representative, Ernest Peele, had noticed Hoai's absence from his station and had questioned him about them. Peele acknowleged in court that he had been informed of the threats against Hoai and emphatically rejected the claims of Vo to have bought the station for one dollar in a contract that Sunoco had not been ad-

vised about ahead of time. Sunoco sent Hoai a letter making it clear to him that his franchise agreement required him to be in the station managing it, a letter whose implications for the loss of his franchise were not lost on Hoai, who hired counsel and sought to regain his station, with the professed support of Sunoco, who continued to tell him that he was their dealer. The Jones, Day attorneys, Roseman and Ottman, learned of these things in the TRO proceeding in the Superior Court of the District that later ensued. Hoai an attempt to get Vo and Vo's thugs to leave the station in June that was unsuccessful and then hired an attorney, a fellow Vietnamese, who ultimately turned out to be working for Minh and Luu. Finally, Hoai fired her upon discovering her complicity with his tormentors.

On August 25, 1986, Hoai, accompanied by the two Hemenways, and carrying the notice

to surrender the premises that is required to be preliminarily given an occupant of land under D.C. procedures, reentered the station and asked the people in it at the time, all Vo employees, to leave, which, to the surprise of John Hemenway, they did. Vo was not present at the time but was in communication with his then-attorney, Arif, and Thach, who soon appeared. An agreement of settlement and compromise was worked out between the parties under which Vo and Hoai agreed that they would abide by the decree of Ernest Peele, the Sunoco Area Representative, who was to come to the station the following morning, the morning of August 26, 1986, as to who was <u>the</u> dealer of Sunoco at the site. The party, as between Hoai and Vo, who was not the dealer was to receive value for any actual contribution in money made to the business pursuant to an inventory taken mutually.

Ernest Peele came the following day and declared that Hoai was the Sunoco dealer and again repudiated Vo's claims to the contrary, as he had in the past. An inventory was begun, with Arif participating for Vo, but was soon discontinued. Instead Vo prepared, without the knowledge of Hoai and Sun at that time, a complaint against Hoai, Sunoco and both of the Hemenways. It is in connection with the filing of this complaint in the Superior Court of the District of Columbia by Vo d/b/a Suntech Sunoco against, the accompanying TRO motion and the proceedings that ensued that the causes of action in this case arose.

First, in planning the TRO attempt, Vo, together with attorneys Roseman and Ottman and their firm, Jones, Day, successfully used the color and authority of the canons of legal ethics of the District of Columbia bar, as officially adopted in opinion

by the District of Columbia Court of Appeals, to force John D. Hemenway to have to cease representing Hoai at the TRO hearing and to force Hoai to give up his counsel of choice in that proceeding. Hoai and Hemenway were forced to call in new counsel late in the evening for a hearing the next morning, counsel completely unfamiliar with the facts and circumstances of the case and that had a devastating and damaging effect. This was achieved by Vo, Roseman, Ottman and the Jones, Day firm, by naming Hemenway in bad faith as a defendant, allegedly having violently entered the station and engaged in acts such as theft of cash. Mere false swearing is not actionable. The gravamen is that the canons as adopted by the D.C. Appeals court are customarily applied by the Superior Court in a procedure which has no safeguards against unconstitutional deprivations. False swearing and bad

faith acts go to intent in using the unconstitutional procedures. The civil rights violation was using the canons as adopted by the highest court of the District and as embodied in the Superior Court customary practice to strip Hoai of counsel of choice and Hemenway of his right to associate with Hoai as counsel. This was done by filing the TRO, inviting Hemenway to the TRO hearing by phone an hour before, serving him upon his arrival with a complaint naming him a defendant, having specifically asked him to come as Hoai's counsel and then, upon his arrival, using the canons to force him out of the case as counsel and compel Hoai to have to bring in someone totally unprepared and unfamiliar with the case at the last minute. The use of these canons in the District permits the disqualification of one's opponent's counsel on the flimsiest

of made up stories.[2] It permits it without any opportunity whatsoever for the cross-examination of those making the accusations upon which the disqualification is based. It, in short, permits litigants to eliminate their opponent's counsel of choice by the bad faith tactical maneuver as was done in this instance. But it is not the bad faith that violates 42 U.S.C. 1983, it is the procedures, or lack thereof, and the practice and custom in the D.C. courts that permits such maneuvering, which, even when overturned on appeal, still does enormous damage to litigants, sometimes causing them to lose their case without any due process through the actual procedures of the case itself at all,

[2]In this case there was, by happenstance, an off duty D.C. police officer, Officer Teddy Gonzalez, in the gas station when Hoai and the Hemenways arrived and shortly thereafter other officers were summoned. Thus there were officers there at all times, all of whom swore that no violence such as was alleged in the complaint against Hemenway occurred.

strictly through a collateral procedure.

A TRO hearing was held with emergency counsel thrust in at the last minute for Hoai in place of Hemenway. Vo was granted a TRO, ignoring the only testimony put forward live and subject to cross-examination, which was that Vo was a mere scrambler who had no legitimate claim to the station. This was done when the judge at the TRO interrupted the argument and imposed upon the case sua sponte a theory of local landlord and tenant law which she felt overruled threats of violence, due process and other federal rights. She was later ratified in this by other Superior Court judges. This sua sponte imposition upon the case instructed counsel for Vo, the defendants Roseman, Ottman and Jones, Day, to add to their original theory in their complaint -- of common law conversion -- a theory of wrongful eviction, one based upon the notion that local landlord

and tenant law could override the federal law governing franchise terminations.

The TRO was granted subject to a condition of a cash bond in the amount of three thousand five hundred dollars for the purpose of protecting Hoai. But, as is the custom and practice in the Superior Court, despite pronunciations to the contrary, no cash bond was required. Instead, Attorney Ottman was allowed to proffer his own check in its stead, which he in fact never gave. Instead Vo was allowed to "pay" his bond with an insufficient funds check drawn on the account he had set up and controlled as part of his fraud to wrest the gas station franchise illegally from Hoai in the first place. The check was never made good while the TRO was in effect and the damage was done and, though ultimately made good for a while, was allowed to be returned to Vo over the protest of Hoai and the Hemenways as is

the practice and custom of the Superior Court. Security for injunctive relief consisting of seizure of property before trial is a fundamental due process right. Local custom and practice of the Superior Court with regard to bonds makes it meaningless and violates this right.

Finally, and this is the principal gravamen of the case: Hoai was promised by the TRO judge on the record that he would have a follow-on preliminary injunction hearing pursuant to Rule 65 at which he could make his case. Her TRO after all was only based on the technicality that, as she saw it, even if he had a right to evict Vo he had to do so along with Sunoco under the summary judgment procedures of the Landlord and Tenant Branch of the Superior Court. Superior Court Rule 65 is federal rule 65 with only slight modifications not pertinent here. However, at that time the Superior Court had another

rule (whose applicable provisions have since been repealed and replaced with others closing the unconstitutional loophole thus created) which allowed attorneys who would do so to effect very nearly anything they wanted ex parte in a completely unconstituional manner and, in this particular case, to not only attach Mr. Hoai's gas station prior to judgment without any hearing on the merits but to actually take it from him altogether and give it to Vo, the intruder and scrambler, as the dealer in his stead. Sunoco, rather than put up with the bother of a Rule 65 proceeding and standing by Hoai as it had stated theretofor that it would, instead cut a secret deal with Vo and his attorneys Roseman and Ottman of Jones, Day behind the scenes and did this through Wagner, Zulli and Forester. Persuaded by Roseman that there was a practice and method in the Superior Court by which the

tiresome requirements of an actual Rule 65 hearing with due process and all that could be dispensed with, the attorneys for Sunoco agreed with Vo and his attorneys to use the Judge-in-Chambers proceeding established by Rule 12-I(b) of the Rules of the Superior Court of the District of Columbia as it then stood. That rule then provided, at 12-I(b) as follows:

> The following matters may be presented for disposition to a Judge in Chambers designated by the Chief Judge, either ex parte or with opposing counsel, as appropriate: ... motions for temporary restraining orders,... and any other matters appropriate for such disposition.

Neither this rule nor any other part of the rules of that court as then in being, nor any custom or practice of that court at that time, put any restraint or safeguards of due process on this unfettered power of the Judge-in-Chambers to

do whatever he personally felt was appropriate ex parte. Attorneys could, and did, as this case proves, take advantage of this lack of standards and restraints to do whatever they felt would please their clients including, as in this case, taking another man's business from him altogether and obtaining it for their client without any notice to or opportunity to participate by Hoai as the party most affected. This rule was taken advantage of jointly by Sun and its attorneys and Vo and his attorneys. They drew up a private agreement which they entitled an extension of the expiring TRO, falsely claimed on its face that it did not affect Hoai, though even the slightest actual inquiry would have shown that to be false, and had it entered as a consent order by the Judge-in-Chambers, who signed it without making a record of the request or any communications that took place.

To a great degree the subsequent course of this proceeding revolves around these acts by which Sunoco switched sides, abandoned Hoai and joined forces with Vo to give the franchise to Vo in Hoai's stead. In particular what ensued in the district court and appeals court revolves around the failure of the plaintiffs below, though alleging that all of these things were done under the color and authority of the laws and rules and practices of the Superior Court, to specifically name Rule 12-I(b) as then constituted in so alleging while simultaneously alleging that, as well as being done under the color and authority of the laws and customs of the Superior Court these things were done in violation of D.C. as well as federal law.

In addition, because Hoai and the Hemenways were sued in the Superior Court they at first fought these matters there. They removed the case to the U.S. District

Court based on the PMPA and were remanded. Ultimately, as the PMPA one year statute of limitations neared its end, Hoai filed suit under the PMPA against Sun in the district court, where, after an attempt by the judge to get rid of the case was reversed in the court of appeals, Hoai won a summary judgment on liability and then a jury trial on damages. In the meantime, however, and while the cross motions for summary judgment in the PMPA case were pending (for a year and a half), the statute of limitations on the civil rights claims also began to run. Accordingly, as matters in the Superior Court had stalled, the plaintiffs-petitioners bought this civil rights suit. The defendants moved to dismiss under Rule 12 (b) (1) and (6) for alleged lack of proper service and failure to state a claim. The Sun defendants filed one such motion and the Jones, Day (J/D) defendants another. Vo

filed a separate, echoing, motion. The J/D motion in particular was accompanied by voluminous material outside the complaint.

This material was relied upon by the judge, the same judge who had the PMPA case before him. Plaintiffs filed token oppositions but, most importantly, filed motions to stay matters in this case until after the then pending summary judgment decision in the PMPA case was made, so that the full impact of that case and all its proceedings, including discovery, might be absorbed into the civil rights case in the interests of judicial economy and resolution of a number of issues in this case, at which time, presumably, the requisite formal conversion to a Rule 56 proceeding with full opportunity to respond to the materials outside the record and brief fully and amend would occur. These motions for a stay, though fully briefed, were never acted upon by

the district court judge. Instead, while sitting on the cross-motions for summary judgment between Hoai and Sunoco in the related case, he conceived and executed a plan whereby he granted the plaintiff Hoai summary judgment on liability in his PMPA case (a result largely dictated by the intermediate reversal he had experienced at the hands of the court of appeals and the opinion issued by the appellate panel) and, on the very same day, dismissed the civil rights action of Hoai and the Hemenways without allowing them any opportunity to respond to the material outside the pleading or amend. In so doing he made no conversion to Rule 56 as required and completely ignored their outstanding motions to stay and has never decided those motions. Simultaneously, and in the same order dismissing the cases without opportunity to amend, he issued a show cause to the plaintiffs counsel demanding that

they show cause quickly as to why they should not be sanctioned for having brought suit. He knew in doing this, for it was on the record before him, that Mr. Hoai's counsel were operating virtually without funds and that Sunoco's counsel was being paid hundreds of thousands of dollars per annum. This dismissal opinion was taken without independent analysis from the dismissal motion of the Jones, Day defendants. The sanction threat has been allowed to hang over the heads of counsel ever since, including during the trial of the PMPA case damages. It was partially pursuant to a supplemental request by Sunoco that the counsel for Hoai be sanctioned, inter alia, for answering a reporter's questions.

This dismissal was appealed. A Rule 60(b) motion for reconsideration was also filed and, eventually, in connection with that motion, a motion to amend if the

lower court were inclined to grant the Rule 60 motion. The Court of appeals held a hearing and avoided the issues discussed above as raised in the briefs before it altogether when the leader of the panel introduced an issue not briefed on the pretense that it had not been decided in the circuit as to whether a Rule 60 (b) motion tolled an appeal. The panel then indicated that if the plaintiffs wanted they could withdraw their appeal and the matter would be remanded to allow consideration of the Rule 60(b) motion. Plaintiffs-petitioners readily agreed, while protesting that the law on the jurisdictional question had been long-settled. However, the Court of Appeals did not do what it indicated on the record it would do. This, it turned out, was a diversion to distract from the issues briefed. Instead it affirmed the lower court's dismissal. In so doing the appel-

late judge posited a new rule which would make Foman v. Davis an empty shell, based in part on his own prior decisions. Under this rule, instead of having to show why amendments should not be allowed, they will only be allowed in special situations as defined by this particular judge. In addition, the opinion tried to get around the fact that it directly contradicted the intervening decision of this Court in Edmonson v. Leesville Concrete and made it clear to the lower court that it could treat the then pending Rule 60(b) motion as a dead letter, which it readily did. Simultaneously, the appellate court refused to allow into the record both of the reply briefs petitioners filed in response to the two oppositions with which they were faced and excluded from the record also a supplemental appendix. Whereupon this petition ensued.

## VII. REASONS FOR ALLOWANCE OF THE WRIT

In the tortuous history of this case there is an attempt to develop a doctrine in direct conflict with leading decisions of this Court under 42 U.S.C. 1983, and the civil rights laws generally as well as important procedural rights. The most important is the famous question of whether, under federal pleading rules and practice, a single misstep (if such it be) will be fatal or whether the long standing rule of Conley v Gibson, supra will be adhered to. In this case the determination of the lower courts not to see the merits of the plaintiffs' claim, and, in particular, the claim of Thanh Vong Hoai, assumes the aspect of what social scientists call "avoidance" behavior. The result has been a departure from the accepted and usual course of judicial proceedings under long-accepted landmark decisions of this Court, the sanctioning of that departure by an

appellate court, and serious conflict with applicable decisions of this Court.

The petitioners, Hoai and the Hemenways, have sought to focus attention on the simple fact that though their complaint did not specifically mention the since repealed provisions of D.C. Superior Court Rule 12-I(b) as it then was at the time of the events complained of, the rule whose existence was what enabled the taking of Mr. Hoai's Sunoco franchise and the giving of it to Mr. Vo with the effect of an act sanctioned and blessed by the courts of the District, it was there, it was known to all parties, and clearly their allegations in the complaint could have referred to no other procedure. Respondents knew of the procedure and knew it was what was being complained about. They were "on notice" , because they had used it to accomplish the acts complained of and could have accomplished them in no other way.

Both the District Court and the Court of Appeals went out of their way to avoid discussing or addressing whether, if the rule were to be specifically alleged in the complaint, the complaint would have been non-dismissible, an effort which one would have thought was barred by the decision of this Court in Conley v Gibson and the many other decisions since Conley that have reiterated and expanded the rule of federal "notice" pleading. Both insisted that the complaint stated no claim and went out of their way to foreclose any possibility that its defects might be cured by amendment. In the end they worked together to assure that there would be no such cure and that the merits of the claim would be buried without ever being considered, seemingly the opposite of what this Court and most other circuits have been saying for the last forty years is the guiding principle in federal courts.

In order to achieve this "failure to see" both courts had to engage in considerable diversionary effort, effort which does no credit to the judicial system and undermines the decisions of this Court and the usual practices under federal "notice" pleading. Primary among these diversionary efforts was a very simple technique of failing to read the complaint as a whole and failing to read, in particular, those parts of it which carried the gravamen of the charge. In so doing both courts seriously undermine not only the procedural precedents referred to but also the decision of this Court in Lugar, supra.

After Lugar clients and attorneys were on notice that the reign of the "courthouse" gangs was no longer to be what it had been. No more would the simple fact that a procedure could be found in state law which avoided the tiresome necessity of having to prove the merits of one's

case before attaching or seizing the property of another be sufficient to protect those who used it. If the procedure was violative of due process, its employment would subject the users to potential liability under 42 U.S.C. 1983.

Since practically all pre-judgment attachment statutes, whatever their formal name, have some procedures to protect against violations of due process, including restrictions on when and against whom they might be employed, provisions requiring the posting of a bond, provisions for immediate hearings to demonstrate their lack of merit, etc., the natural question arises: What about a procedure which, while not denominated a pre-judgment attachment as such, allows a party nonetheless, to use the power and authority of the court to effect the same result; further, what if that procedure allows not only the attachment of property without a

hearing, notice or any other form of due process, but even allows the person's property to be taken from them and given to another. In the abstract, in the light of Lugar, it would seem that the answer to such a question would be obvious. It is true that in Lugar this Court said that it was confining its decision to the pre-judgment attachment context, but this Court clearly was not sending a signal that clever attorneys and their clients might find alternative court procedures that allowed even a more drastic result prior to trial without consideration of the merits of the cause or due process of even the most rudimentary kind and permitted not only the attachment but the seizure of another man's property. Why, then, were such great lengths gone to here by both levels of courts to avoid the obvious application of the Lugar principle and why does the course thus charted so

seriously challenge Lugar and other applicable decisions of this Court and the Courts of Appeals in other circuits ?

The answers are only clear if we start at the beginning. It is always the case that a challenge to such a procedure and its use will also involve challenges also to local law as well. No counsel filing a civil rights complaint for a Lugar type violation of 42 U.S.C. 1983 which uses state court procedures to effect seizure of property prior to any decision or hearing on the merits and completely without due process is going to give up his claims that the procedures resorted to violated state law as well as federal rights. In Lugar itself, for example, Lugar was able to show eventually that the attachment of his truck stop was violative of Virginia procedures as well as violative of his federal rights. Yet the position of both courts in this case was to ignore that the

complaint alleged both violations of D.C. law and of federal law under the color and authority of the rules, practices and procedures of the Superior Court. Seizing upon the allegations of violations of D.C. law in the use of the D.C. procedures which were challenged as violative of federal rights, both courts below completely diverted from, and managed to deliberately ignore, the allegations of the complaint that these same actions were taken under color and authority of the rules, practices and procedures of the Superior Court and were only enabled by those procedures.

The complaint makes the allegation, in para. 38, that the consent order of the Superior Court by which Hoai's franchise was taken from him was represented by the attorney defendants to Sun management as being "under the law of the District of Columbia", necessarily implying that it was procedures of that court that were in-

voked. Para. 40 alleges that the consent order was signed, through the efforts of the defendants, by a Superior Court judge, thus implicating the procedures of that court whereby, at that time, such signatures were obtained. Any doubt on that score is removed by para. 42,[3] which alleges that though the signing of the consent order did not represent any independent judgment of the Superior Court, "Nonetheless, it was done under the color and authority of the Superior Court and its rules and the laws governing it as well as its customs," and then alleges that the defendants held out that it was the Superior Court that required this result, again necessarily implicating the procedures of that court which were ac-

[3]We refer here to the first para. 42, the one in the general, preliminary factual allegations preceding the counts of the complaint proper. Due to computer composition error the paragraph numbers 42 through 44 are repeated in Count One. We will distinguish them, for purposes of this petition by the prefix I-

tually used. Para. 43 focuses on how the defendants used this technique to give their private arrangement the color and authority of the "laws, regulations and customs of the District of Columbia". Then, in the formal allegations of Count One charging specifically the violation of 42 U.S.C. 1983, the plaintiffs further alleged that, while their actions violated the laws and practice of the District as well as federal laws and customs, nonetheless, the defendants "schemed and planned to evade those requirements and to instead use the very color of law and apparent authority of the Superior Court to deprive Hoai of his rights, privileges and immunities." I-44 (emphasis added) Again, in para. I-45 it is alleged that this was done "by the color and authority of the laws of the District of Columbia governing its courts and judicial processes."

Thus, the requirements of 42 U.S.C. 1983 pleading as set out by this Court in Gomez v Toledo, supra are met, viz.:

> By the plain terms of § 1983, two -- and only two -- allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. See Monroe v. Pape, 365 U.S. 167, 171, 81 S.Ct. 473, 475, 5 L. Ed.2d 492 (1961). Petitioner has made both of the required allegations. He alleged that his discharge by respondent violated his right to procedural due process, see Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) and that respondent acted under color of Puerto Rican law. See Monroe v. Pape, supra, at 172-187, 81 S.Ct., at 476-484.

In the present case the Court of Appeals did not reach the question of whether or not there was an adequate allegation of deprivation of a federal right. (p.7,n.4) Its opinion rested on what it perceived as a failure to allege that the actions complained of were taken under the color and authority of D.C. law. But, as we have

seen from the paragraphs of the complaint, in general terms such allegations were made. It is apparent from the opinion below and the opinion which it affirmed that, in a confusing way, the case was dismissed, and that dismissal affirmed, not because the necessary allegations required by this Court for 1983 pleading were not made but rather because of two things: a) In addition to alleging that the actions complained of were taken under color and authority of the laws and regulations of the Superior Court, the plaintiffs also complained that the actions complained of, though taken under color and authority of the laws and regulations of the Superior Court, also violated D.C. law and such things as Rule 65 of the Superior Court rules; and b) the plaintiffs did not allege in the complaint the specific citation of the Rule used to evade the due process requirements of the

federal Constitution and the other federal rights it is alleged were violated.

Both the district court opinion and that of the court of appeals avoid, as if non-existent, the passages we cite above meeting the Gomez requirements. Instead the judges selected only those paragraphs and passages of paragraphs in which it was alleged that the actions complained of were also violative of D.C. law. Thus, in the case of paragraph I-44 where the complaint speaks of how the very color of the law and authority of the Superior Court was used to evade other parts of the local law (i.e. Rule 65, identical to federal 65 in all pertinent respects) the judges chose instead preceding paragraph I-43 where the D.C. law it was charged was evaded by the use of the color and authority of other D.C. law is alleged to have been violated. In other words, under the theory upon which this case was dismissed and dismiss-

al affirmed, a party may not allege that actions violated both federal rights and local law, even where the procedure alleged to be violative of federal rights is also violative of other local or state law. It must be alleged that the only violation was of federal rights and that no state law can have been violated as well. Under this criterion it should be noted, Mr. Lugar should not have had this Court decide in his favor. For, he not only alleged, in addition to the violation of 42 U.S.C. 1983 by depriving him of due process in attaching his property without a hearing, he also alleged that the attachment violated Virginia law and did in fact some weeks later obtain a ruling that the attachment was not valid under Virginia law and would have to be released.

Thus, in the present case the lower courts, by "selective editing," see what they want to see and hear what they want

to hear and throw out petitioners' case, (which is quite evidently what they wished to do) not by interpreting the complaint in favor of the complainants and against the moving parties, but rather by selectively reading only that in the complaint which will favor the moving parties. It would seem that this undermines and overturns the decision of this Court in Gomez in that it says that it is not enough to plead that the actions complained of violated federal law and were under the color and authority of state law, it must also be the case that no allegations are made that in doing the acts complained of there was also a violation of state law and procedures other than those complained of as violating federal rights. In other words, any claim of wrongful attachment or seizure under state law, any claim that the attachment or seizure was in error under state law -- will have to be abandoned if

42 U.S.C. 1983 remedies are to be pursued. It is evident that neither this Court nor any any other court of record has ever imposed such a draconian choice before and, indeed, that the lower courts here contradict this Court's decision by adding this requirement.

At the same time this technique of getting rid of an unwanted complaint, (for such it surely is,) conflicts also with the holding of Conley v Gibson, supra that specific facts need not be set forth to support general allegations. In the oft quoted passage in Conley it is stated:

> The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" [fn.: Rule 8(a) (2), 28 U.S.C.A.] that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms attached to the Rules plainly

> demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.[fn. here states: See, e.g., Rule 12(e) (motion for a more definite statement); Rule 12(f)(motion to strike portions of the pleading); Rule 12(c) (motion for judgment on the pleadings); Rule 16(pre-trial procedure and formulation of issues); Rules 26-37(depositions and discovery); Rule 56(motion for summary judgment);Rule 15(Right to amend).] Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately sets forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Cf. Maty v. Grasselli Chemical Co., 303 U.S. 197, 58 S.Ct. 507, 82 L.Ed.745 Id. at 47-8

It is clear that to make the failure to name the specific Rule 12-I(b) of the Superior Court in the complaint fatal is precisely such a misstep as is barred directly by Conley. The procedures of the

Federal Rules referred to would easily enable the addition to the complaint of the specific Superior Court Rule 12-I(b) as it then existed (not in the federal rules) which was used to effect the wrongs complained of in violation of Rule 65 with its established constitutional safeguards.

Further, under the "notice pleading" standard defendants already knew that a Superior Court rule and procedure was involved. As the affidavit of Jeffrey Wagner, Sun attorney-defendant, shows, (as filed in the related case also then before the district court judge,) Roseman of J/D explained this procedure for getting around the stifling and constitutional requirements of a hearing under Rule 65 to Wagner who in turn checked them out with

Forester, as the expert on local rules.[4] Attorneys are held to know procedures of a court which they successfully use. The holdings below are designed with great ingenuity to evade the rule of Conley and, therefore, conflict with it in this regard, as if attorneys could not know the court procedures they do, in fact, use. Further, they vary from the accepted practice that has been followed under Conley since it was decided 35 years ago.

In addition to the conflicts with Conley and Gomez, and the variance from the usual and accepted practice under them, there is

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[4]A- . Courts have a right to take notice of their own records. Bienville Water Supply Co. v Mobile 186 US 212. Including cases submitted before the court at the same time. West Ohio Gas Co. v Public Utilities Com. 294 US 63. Here it is clear that the district court did not want the record which was building in the related Petroleum Marketing Practices Act (PMPA) case of Hoai v Sun then before him to be noticed. Only by consciously "not seeing" what was revealed in that companion case and preventing such a record from building in this case could he successfully bury the plaintiffs' case here.

a further such conflict and variance here. For, to deliberately ignore that which is in favor of the complainants and parties moved against under Rule 12(b)(6) and to "selectively see" the complaint to favor the movants when not to do so and to instead read and emphasize what the complainants have stated in the complaint which would pass Rule 12(b)(6) muster is not only to interpret the complaint in favor of the moving party and the complainants in violation of the most basic established practice under the federal rules, it is positively to distort that requirement. There is no more basic tenet laid down by this Court than that the allegations of the complaint must be taken as true for purposes of a Rule 12 motion. Walker Process Equip. v Food Machine & Chem. Corp. (1965) 382 US 172, 86 SCt 347, 15 Led2d 247. To only select what will enable an erroneous grant of dismissal

from a complaint and ignore other allegations in the same complaint that would bar dismissal is scarcely to take the allegations of the complaint as true or interpret in favor of the party moved against in line with universal practice. Yet the ironclad rule of this Court is that on a motion to dismiss the allegations of the complaint must be taken in favor of the complainants. Scheuer v Rhodes, supra. The decisions here are in conflict with that famous decision. They conflict also with this Court's decision in Hospital Bldg. Co. v Trustees of Rex Hospital that complaints must be fairly read. Here the lower courts have set out from the outset to read the complaint unfairly to the plaintiffs if they could.

In line with this selective technique there is a further conflict with Conley here that argues for the grant of the writ which also varies greatly from established

practice. In Conley (at 45-6) it was held that this Court follows:

> the accepted rule that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that which would entitle him to relief. (citations omitted).

In all other circuits the plain language of this mandate has been taken to mean that the burden is upon the moving party to show that no facts can be proven to show that the general allegations of the complaint can be supported. Here below we see the unseemly spectacle of judges and moving parties stumbling over each other to not take notice of Rule 12-I(b) of the Superior Court as it existed at the time complained of, a fact of which courts are generally required to take notice -- the existence of a statute or regulation of a court.

The court of appeals here has created conflict with Conley and the regular practice which has developed under this justly

famous passage by reversing the burden. Here they say the defendants had no duty to show this Rule 12-I(b) was not there. Instead these opinions say, unless the rule was cited by its specific alphanumeric designation in the complaint, even if there were general allegations that the rules and practices of the court were invoked, is is as if the Rule did not exist. This is a direct challenge to the authority of this Court and the invariable practice in all other circuits under its famous holding in Conley. It is a conflict and variance that requires the writ be issued so that it may be corrected.

In connection with challenging the principles established by this Court in the cases cited above, the court of appeals in this case also decided to reverse the applicable precedent of this Court and vary from the established practice in the area of amendment under Rule 15, one of the

corrective areas of the federal rules cited in the passage from Conley above. The court of appeals went out of its way to assure that no amendment would be allowed by the district court. An amendment had been proffered by the plaintiffs solely in connection with their Rule 60(b) motion for reconsideration after they were caught by surprise by the unexpected dismissal. It remains pending to this day and has never been decided upon by the district court.[5] But the court of appeals went out of its way to make it clear that an amendment should not be granted, thus purposely killing the petitioners' Rule

[5]The district court sat on the plaintiff Hoai's motion for summary judgment on liability in the companion PMPA case before the same judge for a year and a half before deciding it. After plaintiff Hoai's limited (by the court, before going to the jury) damages verdict in that case Sun filed a Rule 59 motion which has now been outstanding since October. This litigation of Hoai has demonstrated graphically the famous observation of Mr. Justice Frankfurter that justice can be denied effectively by delay.

60(b) motion in such a manner as to prevent there from ever being an actual ruling on it which could be appealed. Ignoring the fact that the amendment had only been proffered, as is the standard practice, in connection with an undecided Rule 60(b) motion, the court of appeals made up its own judicial doctrine, based upon its own earlier holding in another case, in direct contravention of the landmark decision of this Court in Foman v. Davis, supra. In this case the appellate judge created a rule that inadequate complaints will be allowed to be amended only "in certain special circumstances", rather the reversal of, and a direct challenge to, the holdings of this Court and the mandate of the federal rules. It was done in this way: Purporting to make the decision only at the appellate level, the judge nonetheless sent a clear signal to the district court judge that no amendment

should be allowed, which the latter has heeded by simply refusing to ever act on the Rule 60(b) motion. This technique is a variance from the established practice in which the district court is to be allowed to decide whether it is inclined to grant the Rule 60(b) motion or not and then that inclination is communicated to the Court of Appeals. Here the district court simply refused to decide anything until it was certain of the direction the court of appeals wanted to go in and then, seeing that was a negative direction for the petitioners, decided never to decide. This technique challenges the holding of this Court in Foman in a de facto manner that is a classic tactic of justice delayed as a denial of justice -- in this case a delay of forever. This ought to be corrected by granting the writ and making it clear that such de facto subterfuges to challenge the holding of Foman will not be

allowed. Here there was no examination of whether there had been any prejudice to a defendant that would result from granting an amendment. Absolutely nothing had happened in the case and there had been no responsive pleading, if one accepts the pretense of the court of appeals that only the pleading itself was involved.

That there had been no action in the case, of course, is because petitioners, when the dismissal motions were filed, moved the district court to stay matters in this case until <u>after</u> the then pending summary judgment motion had been decided. (It took a year and a half). The stay motions also were treated with the technique of deciding never to decide them. The district court sat on them, neither denying nor granting them during the many months in which all parties treated matters as in abeyance until they were decided and no party did anything. Then,

instead of waiting until after the decision in the PMPA case and allowing the impact of that decision to be incorporated in this case as requested, which surely would have included amending the complaint,[6] the district court decided in favor of the plaintiff Hoai on the PMPA summary judgment (a result dictated by the intervening reversal of the district court by the appeals court and its resulting opinion[7]) and, on the same day, dismissed the civil rights case complaint so as to no only prevent any correction of the complaint's perceived errors but, just to make sure, in the process issued a show cause to Hoai's counsel and petitioner

[6]Plaintiffs-petitioners saw flaws in the complaint soon after filing it but, rather than amending immediately and using up their single amendment of right decided to wait until the motions to stay were decided and then seek to amend to strengthen and absorb the impact of the PMPA decision in one amendment. This would have served judicial economy and prejudiced noone.

[7]See Hoai v Sun Refining & Marketing Co., Inc. supra.

John D. Hemenway as to why they should not be sanctioned. This crude attempt to control the petitioners and "put them in their place" was candidly revealed at the conference on the Rule 60(b) motion by the remark, in response to Sunoco's demands that the counsel for Hoai be a) subject to millions of dollars in sanctions and b) punished for answering a reporter's questions, that Hoai's litigation generally would be treated like General Powell had just said he would treat the Iraqi army, which is to say it would be surrounded and killed. Such tactics present questions challenging the normal processes of the courts and cases long since decided in segregationist days and should lead to a grant of the petition and appropriate correction. While this show cause has never been acted upon and the sanctions motions have never been acted upon but have instead been allowed to hang over the head

of the counsel for plaintiff Hoai like the sword of Damocles as a control, so that no decision is there for an appeal to be taken from, the use of the show cause as a chilling and intimidating weapon against civil rights litigants in this fashion is something that this Court needs to examine and set some standards on. The misuse of Rule 11 for this purpose has not been examined and should be. This case, with an Asian-American up against the civil rights establishment that has been reluctant to include his particular minority despite the dreams of Dr. King, presents an opportunity to examine this tactic that is necessary to delineating for the future the line between sanctions as an appropriate tool to expedite proceedings and sanctions as a device for denying fair and equal treatment.

A further issue here was the manner in which the appeals court completely

diverted attention from and refused to consider certain key issues such as the above even though they were briefed. Chief among these, in addition to the misuse of Rule 11,[8] was the matter of the massive amount of material outside the pleadings presented with the dismissal motions and not excluded by the district court. In particular the dismissal motion of the J/D defendants contained hundreds of pages of supporting documents, including an affidavit by defendant-attorney Roseman with some 12 exhibits attached. Not only were these materials outside the complaint not excluded, they were relied upon the district court in the opinion in this case, which was issued simultaneously with the opinion in the PMPA case granting Hoai summary judgment for liability in

[8]It is, of course, obviously a good thing that Rule 11 was not available to the segregationist judges of the Deep South in their heyday, else the civil rights of today never would have been developed.

that companion case. A-30-31

Under the mandatory terms of Rule 12(b) as practiced without exception in most federal courts, and certainly in other circuits, this converted the motion for dismissal into one for summary judgment. Yet petitioners were given absolutely no opportunity to respond to this conversion and counter this amount of material outside the pleadings used against them. Petitioners briefed this issue at some length in their appeals briefs and the issue was completely avoided and evaded by the appellate panel at oral argument. The oral argument reveals that in order to distract from this crucial issue, the judge leading the appellate panel brought into the proceeding a "red herring" in the form of an unbriefed issue that was apparent not real, the question of whether or not Rule 60(b) motions toll the appeal, a question long since decided in the nega-

tive and a situation long since dealt with in the D.C. Circuit with an appropriate responsive procedure. Petitioners were given the misleading impression that the case would be remanded, which would have meant a consideration of their Rule 60(b) motion and amendment if they would withdraw the appeal, which they agreed to do. The appeal was not withdrawn, however. This was a maneuver to prevent petitioners from presenting their case.

In addition the petitioners were refused the right to file a reply brief in reply to each of the two oppositions which were filed against them in the court of appeals. Reading FRAP 28(c) according to its plain language, which specifies, in the singular, that there may be a brief filed in reply to the brief of the appellee to mean, as one normally would, that where several appellees each file a brief, one may file a reply to each, petitioners

were startled to find themselves told that they could only have one reply brief filed to the two, greatly differing, opposing briefs filed by two separate sets of appellees. Thinking it was like the practice in this Court, petitioners filed to have their second reply brief filed supplementally, pointing out the plain language of the rule and the practicalities of the matter. To their surprise this was rejected without comment as was a supplemental appendix. Given the evasion and diversionary tactics by the courts below that characterized this case this would seem to be one more attempt to avoid the merits of the case and the admonition of the federal rules that pleadings must be construed so as to do substantial justice. At every turn, in both lower courts, the effort was made to see that the merits of the case were not fully considered. The elimination of multiple reply briefs to

reply to multiple and differing appellee briefs is a serious blow. Under this rule, regardless of the number of appellee briefs, if there were ten or more, there would still be allowed only a single reply brief to all ten. The writ should be granted to straighten this out.

To get to the merits of the Lugar contentions, which, while the existence of Rule 12-I(b) and the right to amend were being avoided, were discussed in the opinion below in the court of appeals, albeit under the crippling conditions imposed by the diversions addressed. The essence of the appellate opinion (A-16) is that the present situation does not present the requisite "'joint activity' with the state" under the Lugar rule to meet the test. It will be noted, however, that all of the cases cited by the judge (A-16-17) are of the type of Dennis v Sparks (1980) 449 US 24 where the fact pattern

was of use of the court procedures in a corrupt fashion without the procedures themselves, as such and on their face, having any constitutional invalidity or being oppressive or contrary to federal rights. In Dennis, for example, the allegations were that the court's regular procedures, which had no flaws in and of themselves, were employed, but the judge was bribed. Thus it can be seen that the entire holding of the courts below was only enabled by the game of "burial" of Rule 12-I(b) of the Superior Court as then constituted and the merits of Hoai's complaint against its invalidity. In order to reach the pre-desired result, just as in the segregationist days, the courts had to completely distort major constitutional safeguards surrounding civil rights litigation as they were developed over the last 35 years in the cases above. Only by doing that could they reach the predesired

result of burying Mr. Hoai's civil rights case and "putting him in his place" under the PMPA case.[9] Thus the necessity to conflict with the rules of this Court and the usual and accepted practices thereunder as set out above. Without being able to bury Rule 12-I(b) out of sight, it would have to be faced in all its pristine unconstitutionality and Mr. Hoai and his case could not have been moved to the back

[9]It may well be, of course, that Judge Edwards, who wrote the appellate opinion in both cases, anticipated that Hoai would obtain his full recovery from Sunoco in the PMPA case and the matter would then disappear from the calendar. If so, Judge Oberdorfer submarined that bit of management by limiting Hoai's damages so severely before they went to the jury, on the theory that Sunoco could "legally" terminate his franchise over seven months after they had illegally terminated it and given it to Vo, that they are minimal. Obviously the limitations will be appealed by Hoai. But that can only be after the resolution of Sun's post trial motions, the first of which has now been outstanding since October. It must be remembered that the summary judgment motion in the PMPA case took a year and a half to decide. More opportunity for denial by delay here.

of the freedom and justice train. The assertion that Lugar does not apply (A-17) because limited to the "the particular context of prejudgment attachment" can only be asserted with any pretense of accuracy if one hides the fact that Rule 12-I(b) (before changed at the beginning of 1991) provided a procedure by which unscrupulous attorneys and their clients could far surpass the mere attachment enabled by the defective Virginia procedures which were struck down in Lugar.

While this maneuvering and diversion to enable this avoidance of the application of Lugar was going on, however, on June 3, 1991 this Court handed down its decision in Edmonson v Leesville Concrete Co. (1991) 500 US ___, 114 Led2d 660. That decision greatly expanded the explanation of the Lugar criteria, codifying them, so to speak, and made it clear that they would apply in this case were Rule 12-I(b)

to be considered and the other procedures alleged and discussed in this petition. The appellate judge relegated it to a footnote (A-19) wherein he repeated the mischaracterization of this fact situation as akin to that in the Dennis v Sparks type of case. Pointing out that the crucial factor in Edmonson was that the peremptory jury challenges "'could not exist' without the direct and indispensable participation of the state, and, more particularly, of the judge" as found by this Court the appeals court refused to see the nose of Rule 12-I(b) and the judge-in-chambers participation of Judge Eilperin in front of its face and said that such assistance was, by contrast "never alleged" in this case. This, however, would seem to prove petitioner's point. There is no procedure in the law more open to abuse of the constitutional safeguards upon which we depend than that by which

private parties may, in effect, enter a judgment signed by a judge. The judge in Edmonson was not alleged to have participated in any conspiracy or have any improper motive. Like Judge Eilperin of the Superior Court here, he simply followed a procedure. There is no difference, under the decision, between a judge allowing the exercise of peremptory jury challenges, with which attorneys then exclude all members of one race, and Judge Eilperin here allowing the entry of a consent order for the purpose of making a deal with a known hoodlum who had threatened Mr. Hoai with murder to give him the franchise which was legitimately Mr. Hoai's.

Surely there can be no case more important than this to warrant an exercise of this Court's certiorari jurisdiction.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I have served by United States mail, first class, postage prepaid, true and accurate copies, 3 each, of the foregoing petition this 18th day of February, 1992, to each of the following counsel of record below:

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